TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page*

MISCELLANEOUS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1200

THE CITY OF CINCINNATI,
Petitioner,

v.

DISCOVERY NETWORK, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial free speech issues, including *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281 (1990); *Pacific Gas and Electric Co. v. Public Utility Comm'n of California*, 475 U.S. 1 (1986); and

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980).

WLF recognizes that state and local governments have a strong interest in regulating usage of their streets and sidewalks, in order to protect the public health and safety and to promote a clean and aesthetically pleasing environment. WLF further recognizes that such regulation is not rendered illegitimate simply because it may inhibit citizens' efforts to express themselves.

WLF nonetheless is extremely concerned that state and local governments, in the exercise of their police powers, not pick and choose among the types of lawful expression they will encourage and those they will subject to strict regulation. All truthful, lawful speech -- regardless whether it can be classified as "commercial" or "noncommercial" -- is entitled to substantial First Amendment protection and should not be singled out for regulation simply because government officials deem its subject matter to be of lesser importance. WLF is concerned that Cincinnati is engaged in just such content-based discrimination against commercial speech in this case; Cincinnati is attempting to ban Respondents' newsracks from city sidewalks while leaving undisturbed other newsracks that cannot meaningfully be distinguished from Respondents'.

In the interests of judicial economy, WLF hereby adopts by reference the Statement of the Case set forth in Respondents' brief. WLF submits this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner categorizes Discovery's and Harmon's publications as commercial speech and goes on to argue as if therefore any regulation of these publications which

serves a governmental interest in a reasonable way must pass constitutional muster. This is wrong.

Ever since *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court has recognized that designating some speech as "commercial" and thence allowing untrammeled scope for its regulation would remove from the protection of the First Amendment a category of speech whose free flow, "[s]o long as we preserve a predominantly free enterprise economy, . . . is indispensable." *Virginia Citizens*, 425 U.S. at 765.

This Court has identified commercial speech as speech which "*proposes* a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473 (1989) (emphasis added) (citing *Virginia Citizens*, 425 U.S. at 762). Speech is not "commercial" merely because it is "uttered for a profit." *Fox*, 492 U.S. at 482. Nor does the degree of First Amendment protection turn on whether "money is spent to project it, as in a paid advertisement of one form or another," or whether speech "involve[s] a solicitation to purchase or otherwise pay or contribute money." *Virginia Citizens*, 425 U.S. at 761 (citations omitted). However, "communications 'can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . .'" *Fox*, 492 U.S. at 475 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983)). Such communications earn full constitutional protection only if the commercial and non-commercial speech are "'inextricably intertwined.'" *Fox*, 492 U.S. at 474.

In elaborating the kind and degree of constitutional protection for commercial speech this Court has not devoted much attention to marking the boundaries of this concept beyond these broad guidelines. That is not surprising because analysis will not readily reveal where commercial speech leaves off and just plain speech takes over. Neither the subject matter of the speech, nor the motivation of the speaker, nor the fact that the speaker is

itself a commercial entity can supply a principle of differentiation.

The two publications involved in this case demonstrate how arbitrary the designation can be. Respondent Discovery Network's magazine provides information about its educational programs to Cincinnati residents. Without doubt, the texts and other materials used in these courses are entitled to full First Amendment protection. This being the case, information about these courses ought to receive the same level of protection. A course catalogue distributed by the University of Cincinnati would surely receive full First Amendment protection.

Respondent Harmon Publishing Company's *Home Magazine* lists homes and other real estate for sale or rent. The casual description of this publication as merely commercial is also problematic. Perhaps an individual classified ad or real estate listing does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). However, the collection of such listings performs quite a different function. It allows potential buyers to survey the real estate market and make comparisons between offerings. When information is presented in this form, it functions less like a classified ad and more like a consumer's guide to the real estate market. In any event, *Home Magazine* does have some noncommercial content. It occasionally includes information about market trends and other real estate matters. J.A. at 166-67. If *Home Magazine* is a commercial publication, it is only because it does not include enough of such material. But surely the degree of First Amendment protection afforded a publication should not vary as a function of its ratio of text to advertising.

This complaint about conventional commercial speech analysis does not prove too much. Of course advertising, contract forms, and many of the other items categorized as commercial speech attract reasonable forms of regulation peculiar to them. It is neither unreasonable nor surprising

that the Court has allowed government to forbid false advertising (as it does defamatory speech) while it may not control the propagation of false ideas or information in political campaigns. The functions, tendencies, and context of professional advertising, for instance, make it constitutionally susceptible to regulation for misleading content as well as downright falsity. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979). And where advertising constitutes direct solicitation of conduct that may be forbidden or bears a particular stigma, there we have speech "brigaded with action," *Speiser v. Randall*, 357 U.S. 513, 536-37 (1958) (Douglas, J. concurring), and as such also attracting a special allowance for regulation. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). None of these forms of regulation is in issue here and none of these justifications for it are relevant.

To be a valid restriction of commercial speech, government regulations must cure some evil generated by a particular kind of commercial speech. "The protection available for particular commercial expression turns on the *nature* both of the expression and of the governmental interest served by its regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) (emphasis added); *see also Virginia Citizens*, 425 U.S. at 761 ("If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content"). Cincinnati's regulation limiting the use of newsracks to newspapers of general circulation does not seek to restrict a particular kind of commercial speech. It restricts commercial speech *qua* commercial speech.

The publications in issue here deal, so far as the record shows, accurately and unobjectionably with lawful activity -- indeed in the case of Discovery Network the activity promoted is surely itself fully protected by the First Amendment. The regulation in question here does not address any of the recognized or imagined evils that

have been invoked to justify greater governmental impositions on advertising. Whatever harms come about from Respondents' newsracks are indistinguishable from those that would be caused by newsracks used to distribute *The Cincinnati Inquirer* (with which Respondent *Home Magazine* inevitably competes for advertising revenue), a diocesan newsletter, or *The Daily Worker*. The regulation in question here discriminates between publications, all of which create the same problems of safety and visual blight, solely on the basis of the contents of the publications. The degree of hazard or blight has nothing to do with the commercial natures of Respondents' publications. None of the Court's decisions, accepting them all as sound and valid, allow this kind of content-based discrimination. Newspapers require no special dispensation so as to justify laws discriminating against other media that compete with them. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 780 (1988) (White, J., dissenting) ("the First Amendment does not create a right of newspaper publishers to take city streets to erect structures to sell their papers").

Accordingly, the decision below may be affirmed without requiring the Court to inquire whether the discrimination is justified by a compelling, or merely a substantial, interest or whether the city has chosen the least restrictive means of addressing the problem of street safety and amenity. *See Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). As far as *amicus* is concerned, the city is free to ban all newsracks, or limit their number, density, design, or location. In so doing, however, it may not exempt one type of publication from regulation altogether, while placing the whole regulatory burden on Respondents, who have not at all been shown to contribute in some special way to the problem the city addresses.

ARGUMENT

I. RESPONDENTS' PUBLICATIONS DESERVE SUBSTANTIAL CONSTITUTIONAL PROTECTION UNDER SETTLED FIRST AMENDMENT PRINCIPLES

A. Commercial Speech May Not Be Subject To Discriminatory Regulation Merely Because It Is Commercial, But Only If It Uniquely Generates Harm

First Amendment protection of speech and press are both implicated in this case. Those protections apply to the widest variety of subjects: politics, social commentary, personal expression (artistic and not so artistic). Speakers and publishers are protected in their attempt to persuade, instruct, move, or annoy the audience they choose. And readers and listeners are protected in their access to information, instruction, persuasion, edification, and amusement. These are basic principles. No rational system of law can accept them while begrudging protection to speech and writing (such as that engaged in by Respondent Harmon Publishing Co.) about one of the most important decision American households make: the purchase of a home. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977); *cf. Virginia Citizens*, 425 U.S. at 761. It would be literally absurd to give full measure of First Amendment protection to dancers unadorned except for G-strings and pasties, *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991), and yet to stint on such protection for Respondent Discovery Network's publication informing persons of educational opportunities.

There may be controversy about the ability of the market optimally to order all manner of economic choice. It is a non-sequitur of major proportions to conclude that

therefore government may act to limit or control what audiences can hear and speakers and publishers may seek to tell them about their market choices. The lesson Justice Holmes sought to teach in his *Lochner* dissent, *see Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), is learned too well if it is extended from allowing virtually free rein to government regulation of market behavior to allowing virtually free rein to regulation of those who speak and publish information relevant to market behavior.

The notion is untenable that a speaker's or publisher's motives, for instance a motive to make money, should bear on the measure of First Amendment protection enjoyed. Most publishers, most media in this country exist to make money. *See Simon & Schuster v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991). No one has ever supposed that the claims of high purpose habitually emitted by publishers of books and newspapers, producers of films, or manufacturers of records must be taken at face value, lest their First Amendment protection be compromised. It is true that some speakers and publishers make money from the sale of the communication itself: movies, books, and records tend to have this characteristic. Others are profitable if they succeed in persuading their audience to spend their money or exercise their franchise, *see Buckley v. Valeo*, 424 U.S. 1 (1976), in certain ways. There is no reason why the latter speech and publication should enjoy less protection than the former.

In any event, these two forms of expression often come inextricably intertwined. *Bolger*, 463 U.S. at 69. Airline and credit card companies distribute magazines replete with restaurant reviews and articles about the pleasures of far away resorts, all designed to encourage the reader to spend money in just those establishments. Skiing magazines evaluate and stimulate the appetite for ski equipment. The same is true of audio equipment, computer, firearm, gardening, and numerous other

specialized magazines.[1] In many of these, the difference between text and advertisement is impossible to maintain, and it is inconceivable that it would be constitutionally permissible to make the extent of regulation turn on an inquiry into who exactly paid the text writer and why. *See generally New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The speech at issue in this case illustrates the difficulty that inheres in drawing a distinction between commercial and noncommercial speech. Respondent Discovery Network's magazine provides information about its educational programs to Cincinnati residents. Without doubt, the texts and other materials used in these courses are entitled to full First Amendment protection. This being the case, information about these courses ought to receive the same level of protection. A course catalogue distributed by the University of Cincinnati would surely receive full First Amendment protection. *Cf. Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that statute forbidding solicitation for religious or philanthropic causes violates freedom of speech and religion). Why then should Respondent's publication, which is analytically indistinguishable from such a catalogue, be demoted to a lesser category of communication?

Respondent Harmon Publishing Company's *Home Magazine* lists homes and other real estate for sale or rent. The casual description of this publication as commercial is also problematic. Perhaps an individual classified ad or real estate listing does no more than propose a commercial transaction. However, the collection of such listings performs quite a different function. It allows potential buyers to survey the real estate market and make comparisons between offerings. When information is

---

[1] The *New York Times* recently reported that a dental research institute in Princeton, New Jersey had published its conclusion that chocolate is good for your teeth. The institute is funded by a candy company. Barry Meier, *Dubious Theory: Chocolate a Cavity Fighter*, N.Y. Times, Apr. 15, 1992.

presented in this form, it functions less like a classified ad and more like a consumer's guide to the real estate market. In any event, *Home Magazine* does have some noncommercial context. It occasionally includes information about market trends and other real estate matters. J.A. at 166-67. If *Home Magazine* is a commercial publication, it is only because it does not include enough of such material. But surely the degree of First Amendment protection afforded a publication should not vary as a function of its ratio of text to advertising. Otherwise, newspapers would receive less protection on Sundays and during the Christmas season.

Given the difficulties in drawing lines, it may be wise, as some scholars have suggested, to discard the distinctions between commercial and non-commercial speech.[2] At the very least, this Court should underscore its traditional limitation on commercial speech restrictions. The regulation must be justified by the *nature* of the particular commercial expression and the harms that ensue to significant governmental interests. *Central Hudson*, 447 U.S. at 563. The nature of a particular expression may encompass both its content, such as false advertising, and its form, such as coercive in-house solicitations. However, the government may not impose discriminatory restrictions based on a tenuous measure of commercial versus non-commercial character.

---

[2] Judge Kozinski and Stuart Banner observe that the commercial speech doctrine is not supported by constitutional analysis, and has not provided suitable distinctions in various instances between commercial, artistic, political, scientific, and religious speech. They suggest adoption of standard content-neutral analysis for all speech: "Governmental regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on free expression is no greater than necessary." Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 651 (1990) (footnote omitted).

B. Appropriate Recognition of Respondents' First Amendment Rights Will Not Foreclose Necessary Government Regulation

Robust protection of commercial speech need not entail a "return[ ] to the bygone era of *Lochner*." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting). It is a canard to claim that full protection of commercial speech precludes the appropriate regulation of commerce. This point is well-illustrated by *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977), which held that a city may not prohibit homeowners from posting "For Sale" signs to stem white flight from a recently integrated community. *Linmark* does not cast doubt upon government's power to regulate the real estate market or to combat racial discrimination; the Court merely declared that the government may not pursue its goals by suppressing the free flow of commercial information.

It is unnecessary virtually to deprive the entire inexactly defined category of commercial speech of First Amendment status in order to sustain government regulation of that subset of commercial speech which is harmful to a well-functioning economy. Nearly every kind of protected speech has its unprotected ugly cousin. Pornography is protected, but obscenity is not. Personal criticism is protected, but defamation is not. Invectives are protected, but fighting words are not. Passionate advocacy is protected, but incitement is not. Likewise, the government may regulate false speech, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"), or speech proposing illegal activity, *see Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) (upholding ban on publication of want ads for gender segregated jobs), whether or not it is commercial. Speech that is a step along the way to a criminal act, like the communication of the floor plan of a bank between persons planning a robbery or a threat communicated to an

extortion victim, is not protected. And speech or publication that appropriates another's name or likeness or invention has likewise always been unprotected, even if the appropriating expression may claim justification by motives the most elevated. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987).

It is not necessary to determine here whether the regulation is permitted because the level of constitutional protection is less or because instead the intensity of the governmental interest is more. Suffice it to say that the regulation must at least be appropriate to the relation between the two. And so the prohibition against false or misleading advertising is wholly appropriate to this kind of speech. Similarly, a text that does no more than propose a particular bargain is no more immune to regulation than the contractual arrangement it is a step along the way to concluding. *See, e.g., Pittsburgh Press*, 413 U.S. at 388 (upholding ban on publication of want ads for gender segregated jobs). But certainly the publications discriminated against by the city's policy here -- like so much advertising -- exceed the bounds of these justifications for regulation. The ways in which they do so are significant.

Respondent Discovery Network's publication contains far more than contract forms to be clipped out and mailed to conclude a bargain. It describes and extols the virtues of a variety of lectures and courses available at Respondent's school. It presumably also gives schedules, tuition, and terms. Nothing could be clearer than that the contents of these courses attract the full measure of First Amendment protection -- though here again the conduct of such schools is subject to a wide variety of regulation. Similarly there can be no doubt that the texts, outlines, and other materials given out or sold in connection with these courses enjoy full First Amendment protection. And so too would course catalogues, such as are distributed by every college and university. Why then should this publication, which analytically -- though not in tone and

cachet -- is indistinguishable from such a catalogue be demoted to some lesser category of communication, such that the city is allowed to discriminate against it in favor of the most debased scandal sheet distributed free and supported by advertising for pornographic literature?

Harmon Publishing Company's *Home Magazine* offers a different rationale for disallowing the discrimination practiced by the city. A classified ad or real estate listing comes very close to being the kind of text that does no more than propose a bargain. That is why such ads and listings may be regulated to comply with fair housing and equal employment opportunity policies. *Pittsburgh Press*, at 385. But an editorial seeking to justify residential segregation would be beyond the reach of such regulation. It is a mistake to argue from the premise underlying *Pittsburgh Press* to the conclusion that *Home Magazine* enjoys no greater First Amendment protection than the individual bare-bones listings it collects. While each listing may do no more than propose a bargain, the collection performs quite a different function. It allows potential buyers to survey the scene, make comparisons, and arrive at conclusions about the state of the market. A magazine carrying articles purporting to do just that might impart some of the same information and give addresses and phone numbers of sellers, and the publishers of such articles may even require payment in exchange for each mention. Magazines offering film or restaurant reviews may operate on this same venal principle. Yet this venality would hardly remove the publication from the scope of the speech and press protection of the Constitution. The listing without comment is, if anything, more reliable, comprehensive, and objective. In any event *Home Magazine* does in fact include some such articles in addition to the listings. Surely the degree of First Amendment protection should not vary as a function of the ratio of text to advertising.

II. PETITIONER'S REGULATION MUST FAIL AS AN ARBITRARY AND IMPERMISSIBLE CONTENT-BASED DISCRIMINATION

The city does not claim that the contents of Respondents' publications threaten any of the harms that this Court has identified to justify regulation of commercial speech. The city says it is not concerned with their content, but only with preserving the amenity and safety of its streets. Such an argument would have considerable force if the city banned all newsracks, restricted them to certain areas, or limited their numbers on a first-come-first-served or random basis. But that is not what it has done. It has said that *The Cincinnati Inquirer* and other such papers may place newsracks in the street as they wish, while *Home Magazine* -- which of course is a competitor for an important class of advertising business -- may not use the street at all. Since this is a distinction based on content it cannot be justified as a time, place, or manner restriction, for those must be content-neutral. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). The Court has asserted that such regulation must be content-neutral to prevent government agents from making judgments about which kinds of speech are worthier than others. The risks of favoritism and improper motivation are palpable in this case. The kinds of publications the city council allows are exactly those which are in a position to reward or punish the politicians who make the regulation. And, as we have pointed out, the disfavored class is in direct competition with the newspapers the city would prefer.

The discrimination here is clearly based on the content of a publication. It certainly is not based on the differential secondary effects of the permitted and forbidden publications. *Cf. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding restrictions on locations of adult theaters where municipality had acted in response to secondary effects of such theaters on

surrounding community). Whether the analysis is undertaken in equal protection[3] or First Amendment terms directly, the reasoning and conclusion are the same. The presence of a First Amendment claim means that discrimination must meet some kind of heightened scrutiny. But as we have discussed, what the city calls the commercial character of the publication involved here hardly provides even a rational basis for such a discrimination. *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) (applying rational basis standard to invalidate discriminatory ordinance). And we suppose that considerably more than that is necessary by way of justification.

Cincinnati is incorrect in asserting that a time, place, or manner restriction qualifies as content-neutral so long as it is not intended to restrict the expression of a particular viewpoint. *See* Pet. Br. at 30. The Court recently rejected that contention, stating: "This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of a public discussion of an entire topic." *Burson v. Freeman*, ____ U.S. ____ (1992) (slip op. at 5) (plurality opinion); *id.* at ____ (slip op. at 8-9) (Stevens, J., dissenting). Even if one concedes that Cincinnati's prohibition of Respondents' newsracks does not suppress viewpoints expressed by Respondents while permitting expression of opposing viewpoints, it is undeniable that the prohibition has the effect of suppressing all discussion (via newsracks) of some topics while permitting newsracks that address other topics.

The Court's hostility to content-based speech regulation has on several occasions been directed at regulation of speech deemed commercial by the Court.

---

[3] *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980) (invoking Equal Protection Clause to strike down Illinois statute that prohibited most residential picketing, but exempted certain types of labor picketing from the prohibition).

Thus, in *Linmark Associates*, the Court struck down an ordinance prohibiting placement of "For Sale" or "Sold" signs on lawns as an improper content-based regulation of commercial speech. The Court noted that the ordinance in question permitted posting of virtually any lawn signs other than signs stating that one's house was for sale; while suggesting that municipalities were free to prohibit all lawn signs, the Court held that the First Amendment forbids prohibiting some signs based on their content while permitting others. *Linmark Associates*, 431 U.S. at 94.

Similarly, *Bolger* struck down on First Amendment grounds a federal statute that prohibited the unsolicited mailing of commercial information regarding contraceptives. *Bolger*, 463 U.S. at 70. While accepting the notion that some content-based regulation of commercial speech may be permissible "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages" (*id.* at 65), the Court said that the federal government's content-based discrimination against the mailings at issue could not stand in the absence of any evidence that the mailings could result in deception or confusion or were otherwise subject to regulation.

Nor, of course, is this a case where the government is regulating speech in an essentially proprietary capacity, a setting in which government may have more leeway to discriminate. *See Greer v. Spock*, 424 U.S. 828 (1976) (military post); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (advertising space on city transit vehicles). Even in that setting, however, the discrimination "must not be arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303; *see also Greer*, 424 U.S. at 838-39. In those cases -- where, as it happens, the regulators gave *commercial* speech preferential treatment over *political* speech -- the Court found that valid purposes existed to justify the discrimination.

Petitioner and its supporting *amici* argue that the newsrack ordinance's unequal treatment of general-

circulation newspapers and Respondents' publications does not constitute impermissible content-based discrimination because the Court has traditionally permitted speech categorized as "commercial" to be treated less favorably than speech categorized as "noncommercial." By thus pigeonholing Respondents' newsracks into a category labeled "commercial," Petitioner attempts to justify its ban on such newsracks while permitting other newsracks to remain on the city's streets.

But just as we have shown that no sufficient basis exists for discriminating between Respondents' *publications* and those the city would allow in terms of the harm sought to be addressed, so *a fortiori* no meaningful distinction can be drawn between the message conveyed by Respondents' *newsracks* as such and the message conveyed by newsracks containing general-circulation newspapers. Both types of newsracks attempt to draw attention to and to promote the distribution of publications contained in the newsracks. Given the lack of meaningful distinctions between the contents of the two types of publications, Petitioners cannot justify their prohibition of one type of newsrack and their acceptance of the other type of newsrack by attaching "commercial" and "noncommercial" labels to the publications.

The Court on occasion has expressed willingness to permit jurisdictions to discriminate against "commercial" speech based on the content of the speech. For example, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a majority of the Court appeared willing to uphold an ordinance that permitted a property owner to post billboards on his own property that advertised the nature of the business being conducted on the property, but not to post billboards that advertised businesses being conducted elsewhere. *Metromedia*, 453 U.S. at 511-12 (plurality opinion); *id.* at 555-560 (Burger, J., dissenting). But in each such instance, the jurisdictions had substantial justifications for distinguishing among the expressive activities at issue. Thus, in *Metromedia*, the plurality opinion determined that the distinction San Diego drew

between on-site and off-site commercial billboards was constitutionally defensible because: (1) the ban on off-site billboards was directly related to the city's stated objectives of traffic safety and aesthetics; (2) off-site advertising with its periodically changing content presented a more acute problem than did on-site advertising; and (3) a commercial enterprise has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. *Id.* at 511-12.

In contrast, Petitioner has advanced no justification for favoring newspaper newsracks over Respondents' newsracks -- other than a naked preference for general-circulation newspapers based on the content of those publications. Petitioner has not argued that Respondents' newsracks present any more danger to traffic safety or to aesthetic sensibilities than do newspaper newsracks.[4] Indeed, given that Respondents' newsracks make up such a small percentage of existing newsracks on the streets of Cincinnati, Petitioner's selective newsrack ban cannot have any appreciable effect on the traffic safety and aesthetic concerns Petitioner raises. Petitioner's decision to favor one type of publication based on the content of those publications is precisely the type of content-based discrimination that is not permitted under the First Amendment -- particularly when, as here, the First Amendment interests of Respondents are nearly identical to the First Amendment interests of those who seek to sell

[4] *Amicus* City of New York suggests that newsracks such as those maintained by Respondents are a source of urban blight because they are often not well-maintained and because (since they can be opened without use of a coin) they can be used as trash dispensers. Suffice it to say that there is no such evidence in this record. Moreover, Petitioner's ordinance does not distinguish between newsracks based on whether they are coin-operated. Any such ordinance would, of course, prohibit newsrack distribution of the many general-circulation newspapers that are distributed for free.

general-circulation newspapers by placing them in newsracks.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Charles Fried[5]
(Counsel of Record)
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

Richard K. Willard
David A. Price
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-8073

Daniel J. Popeo
Richard A. Samp
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Counsel for *amicus curiae*

June 1, 1992

[5] H. Christopher Bartolomucci and Viet D. Dinh, students at the Harvard Law School, and Stephen B. Kinnaird, a student at Yale Law School, assisted in the preparation of this brief.